Supreme Court, U.S.
FILED
APR 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1134

In the Supreme Court of the United States

OCTOBER TERM, 1986

VGS CORPORATION d/b/a SOUTHLAND OIL COMPANY, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether sovereign immunity bars petitioners' claim for prejudgment interest against the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 808 F.2d 842. The opinion of the district court (Pet. App. 21a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1986. The petition for a writ of certiorari was filed on January 8, 1987. The jurisdic-

tion of this Court arises under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1975, 15 U.S.C. 754(a)(1).

STATEMENT

1. a. The Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. 751 *et seq.*, and regulations promulgated under it mandated a now-defunct system of price controls on domestic crude oil. In order to offset the competitive disadvantage this system imposed on refiners with below-average access to price-controlled domestic crude oil, the Department of Energy (DOE or the Department) established the "entitlements program," 10 C.F.R. 211.67 (1980), a system of transfer payments under which refiners with greater access to price-controlled crude oil were required to purchase "entitlements" from refiners with less access to such oil. DOE issued monthly "entitlements notices" specifying the number of entitlements each refiner was obligated to buy, or permitted to sell, that month. See generally *Husky Oil Co.* v. *DOE*, 582 F.2d 644, 645-647 (T.E.C.A. 1978).

Section 504 of the Department of Energy Organization Act, 42 U.S.C. 7194, authorizes "exception relief," awarded on a case-by-case basis by DOE's Office of Hearings and Appeals (OHA), to refiners found to be suffering a gross inequity or a serious hardship caused by the price control and entitlements program. See 10 C.F.R. 205.50 *et seq.* (1984). OHA generally awarded exception relief prospectively, based on projections of a firm's future performance. The relief took the form of excusing the firm from purchasing (or permitting the firm to sell) a specified

quantity of entitlements in a future period. Since the relief was initially based on a projection, it was subject to OHA review of actual data after the end of a firm's fiscal year. Based on that review, OHA would issue a final relief order. If the final order differed from the projection, the firm would be permitted to sell, or required to buy, entitlements on the next entitlements notice. OHA denials of exception relief could be appealed to the Federal Energy Regulatory Commission (FERC) (see 42 U.S.C. 7194(b)(1)). Pet. App. 2a-3a.

b. The crude oil price control program was terminated, as a general matter, on January 28, 1981, by Executive Order No. 12,287. 3 C.F.R. 124 (1982). This left DOE with questions as to how to wind down the entitlements program. In February 1981, DOE issued an entitlements notice for December 1980 and announced that it would issue an entitlements notice for the first 27 days of January 1981, but the latter was delayed by a series of injunctions.[1] Eventually DOE determined that it would terminate the entitlements program without issuing any further entitle-

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[1] The series of preliminary injunctions preventing publication of entitlements notices after decontrol culminated in the injunction issued in *Mobil Oil Corp.* v. *DOE*, 520 F. Supp. 420 (N.D.N.Y. 1981). While the Temporary Emergency Court of Appeals reversed the district court's preliminary injunction (659 F.2d 150 (1981)), its mandate was stayed until this Court denied certiorari on December 7, 1981 (454 U.S. 1110). By that time, however, other related litigation was under way, which called into question the propriety of employing certain data that would be used to calculate entitlements notices. This litigation was not finally resolved in DOE's favor until 1983. *Union Oil Co. of California* v. *DOE*, 688 F.2d 797, 801-802 (T.E.C.A. 1982), cert. denied, 459 U.S. 1202 (1983). See generally 49 Fed. Reg. 27410, 27413 (1984).

ments notices after the December 1980 notice. 49 Fed. Reg. 27410, 27413 (1984); 46 Fed. Reg. 12945, 12946 (1981). Challenges to this decision were rejected by the Temporary Emergency Court of Appeals (TECA). *Texaco, Inc.* v. *DOE*, 795 F.2d 1021 (1986), cert. dismissed, No. 86-187 (Aug. 19, 1986) ("*Texaco* litigation").

The end of the entitlements program eliminated the mechanism by which "exception relief" had been implemented. Of particular relevance here, it eliminated the mechanism for making adjustments required by final OHA exception relief awards, made after January 1981, that adjusted the provisional awards made for prior periods. After considering how to deal with this problem, DOE on January 9, 1985, issued a "Final Decision" stating that refiners that would otherwise have been permitted, on account of exception relief, to sell entitlements should be paid their exception relief in an alternate manner that "would be fair to firms with [such] * * * orders," yet would still be "in keeping with the transition from a regulated to a deregulated market and with the objectives of the EPAA." 50 Fed. Reg. 1919, 1921 (1985). Specifically, the Final Decision stated that if OHA determined that refiners as a class had been injured by violations of the EPAA regulations, DOE would pay such exception relief as might be due out of the Department's crude oil "overcharge fund," made up of penalties paid by companies in crude oil overcharge actions. Thus, DOE determined on January 9, 1985, that it should undertake to award exception relief from a fund in *its* charge, rather than prolong the entitlements program as a source for such exception relief. The Final Decision, which was not

challenged in this litigation, made no provision for the addition of interest to exception relief payments. See 50 Fed. Reg. 1921-1922.[2]

At the time of the Final Decision, the challenge in the *Texaco* litigation to DOE's decision not to issue further entitlements notices had not yet been resolved in DOE's favor. Had DOE lost this challenge, there was still the possibility that exception relief would be paid by means of entitlements notices. Accordingly, OHA concluded that "any payment pursuant to [DOE's Final Decision] * * * will be placed in an interest-bearing escrow account pending the outcome of [the *Texaco*] litigation." 50 Fed. Reg. 27402, 27403 n.1 (1985). On October 2, 1985, OHA issued an order establishing interest-bearing escrow accounts for firms awarded exception relief. 50 Fed. Reg. 41572. In that order, OHA responded to comments from various firms, including petitioners, who asserted that in addition to interest that would accrue once the escrow accounts were established, retroactive interest should be paid to each recipient of relief from the date of its award. OHA rejected this contention, emphasizing that "if the final Entitlements Notices were to be issued, DOE would clearly lack the authority under [its] regulations to require refiner-buyers to add interest to their payments to refiner-sellers" (*id.* at 41575 (footnote omitted)).

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[2] On June 21, 1985, OHA made the necessary finding that refiners as a class had indeed been injured by violations of the EPAA regulations (50 Fed. Reg. 27400-27401), and announced the implementation of the January 9, 1985, Final Decision, permitting those entitled to exception relief to apply for payment from the overcharge fund (*id.* at 27402-27403).

OHA also explained that interest had never been awarded in an entitlements exception case during the program's history, in spite of routine substantial delays in making necessary adjustments. Since use of the overcharge monies was "strictly a substitute method for funding receive orders," OHA found that retroactive interest was not appropriate (*ibid.*).

2. a. Petitioners' claims against DOE arose out of two OHA orders, issued on February 23, 1981, recalculating and reducing petitioner Southland's exception relief for 1977 and 1978 and requiring Southland to buy an additional $13.4 million in entitlements. Southland paid this amount on the December 1980 entitlements notice but also challenged the orders in two ways: it appealed the orders to FERC, and it sought and obtained a preliminary injunction from the U.S. District Court for the Southern District of Mississippi. The injunction directed that in the January entitlements notice Southland be permitted to sell entitlements so that it would receive back the amount it had been required by the orders to pay, which would be placed in an interest-bearing escrow account and ultimately paid to Southland to the extent it prevailed before FERC. Pet. App. 3a-4a. This mechanism was never implemented, however, because as noted above no January entitlements notice was ever issued. 49 Fed. Reg. 27410 (1984).

On May 8, 1984, FERC adopted a decision of its presiding official that OHA had miscalculated Southland's exception relief, and that Southland would be permitted to sell $5,956,499 worth of entitlements on the next entitlements notice, but that "[i]n the event no further entitlements notice is issued, DOE will take other appropriate action to implement this order." *Southland Oil Company/VGS Corp.*, 25 F.E.R.C.

¶ 62,118, at 63,260 (1983), adopted by 27 F.E.R.C. ¶ 61,205 (1984). In reaching this conclusion, the presiding official specifically rejected petitioners' claim that interest be added to this amount (25 F.E.R.C. at 63,258-63,259). The full Commission concluded that "[Southland] has not shown that it is entitled to any interest on the entitlements it was required to purchase in February 1981" (27 F.E.R.C. at 61,398).

b. On March 6, 1985, petitioners filed their amended complaint in this case, requesting that the district court require DOE to "implement" the FERC order immediately. The amended complaint did not challenge DOE's January 9, 1985, Final Decision to pay exception relief from the overcharge funds, nor did it specifically seek interest. DOE argued that petitioners' action had become moot, since petitioners were guaranteed to receive their entitlements exception relief, either by means of the overcharge funds if DOE prevailed in *Texaco*, or by means of entitlements notices if it did not. Pet. App. 11a-13a.

The district court ruled on July 12, 1985, that petitioners were "entitled to a declaratory judgment that the DOE has an unconditional and non-discretionary obligation to implement the May 8, 1984, FERC order, requiring DOE to restore to [petitioners] $5,956,499.00" (Pet. App. 17a-18a). The court held that the positions taken by DOE were "frivolous" (*id.* at 18a) and castigated the agency for what it perceived was a calculated policy of delay (*id.* at 20a).

On December 4, 1985, the district court granted petitioners' motion for summary judgment and directed DOE to make payment within 20 days of the exception relief granted by the FERC order plus in-

terest from May 8, 1984, the date of the FERC order (Pet. App. 21a-25a). On December 20, 1985, DOE paid petitioners $6,055,390, representing its $5,956,499 exception relief award plus $98,891 of interest that had accrued on its escrow since October 2, 1985, the date on which DOE created the interest-bearing escrow accounts out of the overcharge fund. See *id.* at 6a; page 5, *supra*. DOE did not pay interest for the period from May 8, 1984, to October 2, 1985. Instead, per stipulated order, this amount was sequestered by DOE in an interest-bearing account pending appeal (see Pet. App. 28a-29a).

On the interest issue, the district court asserted that since the payment to petitioners was coming from the crude oil overcharge funds, DOE's position that petitioners would not have been entitled to interest during the entitlements program itself "misses the point," and that "FERC's denial of interest to [petitioners] is irrelevant to the present issue" (Pet. App. 24a). Rather, the court held, "[p]re-judgment interest is appropriate where the amount allegedly due was liquidated when the claim was originally made or where the denial of the claim was frivolous or in bad faith" (*ibid.* (citation omitted)). The court held that petitioners were entitled to interest under either test. Although DOE contended that the claim for interest was barred by sovereign immunity, the court did not discuss the issue in its opinion.

c. DOE appealed the prejudgment interest ruling to the court of appeals, which reversed (Pet. App. 1a-10a), holding that "the doctrine of sovereign immunity precludes an award of prejudgment interest" (*id.* at 7a). The court applied the longstanding rule laid down by this Court that "in the absence of a *specific* provision in a contract or statute, or express

consent by Congress, interest does not run on a claim against the United States" (*ibid.* (emphasis in original)). The court held that there was no statutory authority for payment of interest by the government (*id.* at 9a-10a).

ARGUMENT

1. The court of appeals' decision does not warrant this Court's review because the dispute is, to say the least, sui generis. It turns on the nature of petitioners' claim arising on account of DOE's ad hoc determination to use particular funds—the overcharge funds—to make an equitable arrangement to deal with claims remaining after the termination of a once elaborate but now defunct program of transfer payments within an industry.[3] There is, of course, no conflict among the courts of appeals: only the specialized Temporary Emergency Court of Appeals could have heard such a case. See 12 U.S.C. 1904 note (§ 211(b)(2)), as incorporated by 15 U.S.C. 754(a)(1); *Bray* v. *United States*, 423 U.S. 73, 74 (1975).

2. In any event, the decision of the court of appeals was correct. It routinely applied the firmly established rule, reaffirmed by this Court only last Term, that "interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest." *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986), slip op. 1. Congress is well aware of the presumption which runs against an award of prejudgment interest against the government. It can

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[3] The EPAA, which provided the statutory authority for the entitlements program, expired on September 30, 1981. See 15 U.S.C. 760(g).

provide for such an award if it deems it wise, and it has not so provided here. Cf. *id.* at 8; compare Pet. 18 & n.12.

Petitioners attempt to distinguish the long line of precedents in this Court, on which TECA relied, by asserting that in those cases "the disputed interest had accrued on funds which the federal government had collected for its own benefit," while "[t]his case involves no claim on funds which the government has asserted are its own" (Pet. 12, 15). But the assertion that in this case the underlying funds were not claimed by the United States is both irrelevant and false.

a. The no-interest rule derives from the more general principle that "the United States, in the absence of its consent, is immune from suit." *Library of Congress* v. *Shaw*, slip op. 5 (citation omitted). Petitioners cannot seriously dispute that their suit is against the United States, and that the United States has not consented to make the payment they seek. No statute involved in this litigation provides for the award of prejudgment interest against the government. That should end the matter.

The prejudgment interest petitioners claim would have to be paid out of money that would otherwise belong to the federal government and remain in the Treasury. The distribution of monies in the overcharge fund is governed by the May 5, 1986, settlement in *In re DOE Stripper Well Exemption Litigation*, 578 F.Supp. 586 (D. Kan. 1983), which provides that the federal government, state governments, and various segments of the petroleum industry will receive specified shares. The settlement[4]—to which

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[4] Part V.G. of the settlement (at 17) provides in its entirety:

petitioners are parties—specifically provides that any funds required for exception relief, including any interest if awarded by a court, are to be paid by the federal government "out of *its* share of funds under this Agreement, or out of funds * * * to which no other Party [*i.e.*, besides the federal government] has a claim by virtue of this Agreement" (emphasis added).[5]

Preservation of Entitlements Claims. This Agreement specifically excludes and preserves any and all claims by a Refiner applicant against DOE for payment by DOE of (i) exception relief from the crude oil Entitlements Program including, but not limited to, exceptions or adjustments based on or pursuant to *Delta/Beacon* or Naptha Entitlements relief [particular types of entitlements exception relief], which has been or may be granted by the [Economic Regulatory Administration], OHA, the Federal Energy Regulatory Commission, or any court or (ii) any adjustments or changes to the draft January 1981 Notice or Entitlements Adjustment Notice. This Agreement also specifically excludes any and all claims by a Refiner against DOE for interest on such adjustment or change or exception relief and for attorneys' fees and costs incurred in connection with such relief. DOE agrees to provide all funds necessary to fund and pay all amounts determined to be due any Refiner pursuant to or as a result of any such adjustments or changes or relief including such interest and attorneys' fees, if awarded, out of its share of funds under this Agreement, or out of funds (other than funds resulting from violations or alleged violations except Alleged Crude Oil Violations) to which no other Party has a claim by virtue of this Agreement. DOE's obligations shall not affect the amount or timing of any payment to any other Party made pursuant to this Agreement.

We have lodged a copy of the settlement with the Court.

[5] Prior to the settlement, DOE first planned, in the absence of contrary instructions from Congress, that *all* moneys in the overcharge fund would be paid to the Treasury; later, as dis-

Thus, *United States* v. *N.Y. Rayon Importing Co. (#2)*, 329 U.S. 654 (1947)—on which the court of appeals here relied—is controlling. There the Customs Court had decided in 1937 that a refund of customs duties was owed by the government; however, the companies that had originally sought the refund had since been dissolved. The refund was accordingly forwarded to the Comptroller General, who deposited the money in a trust fund in the United States Treasury and refused to pay the various claimants without a judicial decision as to ownership. The Court of Claims designated the proper claimant, and awarded prejudgment interest to run from April 19, 1941, the date of a change in state law clarifying the capacity of a dissolved corporation to maintain a suit. This Court reversed the award of prejudgment interest, because there was no consent on the part of the government that interest should be paid. The award of interest that was barred by this Court in *N.Y. Rayon* was for the period in which, as described by the court of appeals here, "the government had no claim to these funds" and "was merely holding the money until the rightful owner appeared." Pet. App. 9a; see 329 U.S. at 659-660, 661; see also *United States* v. *Louisiana*, 446 U.S. 253, 261-266 (1980) (U.S. not required to pay interest to Louisiana on impounded funds eventually awarded to the State).[6]

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cussed above, it planned to make payments from the fund for exceptions relief, but did not contemplate the payment of interest. At any time, then, a payment of prejudgment interest would have been out of the U.S. Treasury. See generally 50 Fed. Reg. 27400, 27402, 27403 (1985).

[6] Petitioners assert (Pet. 13-14) that the court of appeals' decision is contrary to *Miller* v. *Robertson*, 266 U.S. 243

b. Moreover, the overcharge funds from which petitioners were paid the principal amount of their claim ($5,956,499) and from which they seek prejudgment interest were collected by DOE in the enforcement of its regulations, and from the outset the federal government *did* claim an interest in them. DOE's initial policy was that, absent specific congressional direction to the contrary, all amounts held in the overcharge escrow would be paid to the general fund of the U.S. Treasury.[7] This policy was modified as noted above—first by the decision to pay entitlements relief out of the overcharge fund, and later by the settlement in *In re DOE Stripper Well Exemption*

(1924), where the Court upheld an award of interest on a claim against property seized by the government under the Trading with the Enemy Act. See also *Henkels* v. *Sutherland*, 271 U.S. 298 (1926). If the decisions in those cases had been as broad as petitioners suggest, they would have been limited by *N.Y. Rayon*, as petitioners appear to recognize (see Pet. 17). But in fact there is no conflict. In *Miller*, the Court stressed that the claim was not against the United States (266 U.S. at 257), and it is unclear whether it was the government that had to pay the interest (see *id.* at 259 ("The proposition that the enemy defendants, as a matter of law, are entitled to be relieved from interest during the war cannot be sustained") (citations omitted)). In *Henkels*, the assets seized—mistakenly, as it turned out—had been plaintiff's at the time of the seizure and had been segregated along with other such assets and invested by the government. Here, petitioners' claim is for interest on the amount of their claim for the period *before* the money they ultimately received was placed in separate escrow.

[7] The statutory authority for the overcharge fund, 12 U.S.C. 1904 note (§ 209), said only that courts could "order restitution of moneys received" through overcharges; it did not specify who would receive the restitution.

Litigation, *supra*, providing that crude oil overcharge funds are to be divided between the federal government, the governments of the various states, and various segments of the petroleum industry. It was not clear until after the *Texaco* litigation, however, that petitioners should be paid from the overcharge fund, and until that time the government had a "claim" on petitioners' "share" of the funds insofar as it had a duty to ensure that they were paid to the proper party. Whether that party was the federal government, a state, petitioners, or another refiner, the point remains that the funds were properly in the possession of the federal government, which was—on its own behalf and for others—in good faith resisting petitioners' claim to them. See generally 50 Fed. Reg. 27400, 27402, 27403 (1985).

Finally, had DOE decided to issue a new entitlements notice or not to make exception relief payments from the overcharge fund, petitioners would clearly have been unable to claim prejudgment interest against anyone. To make an award against DOE would, therefore, be anomalous and would punish it for making the fundamental and good faith policy decisions it did.

3. Petitioners also assert that "TECA's reversal of the District Court's interest award is directly contrary to the language and intent of the 1976 amendment to § 702 of the Administrative Procedure Act [5 U.S.C. 702]" (Pet. 18), which waives sovereign immunity for actions against the United States which seek relief other than money damages. As petitioners indicate (*id.* at 20), the court of appeals ignored this argument in its opinion.

The argument was presumably ignored because it is wholly without merit. In the first place, Section

702 of the Administrative Procedure Act was inapplicable to the entire entitlements program. The EPAA—pursuant to which the entitlements regulations were promulgated and revoked—incorporated by reference Section 207 of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note. 15 U.S.C. 754(a)(1)(A). And Section 207 specifically stated that "[t]he functions exercised under this title are excluded from the operation of * * * chapter 7 of title 5, United States Code," in which is found 5 U.S.C. 702. See also *Pasco, Inc.* v. *Federal Energy Administration*, 525 F.2d 1391, 1405 n.26 (T.E.C.A. 1975); *Carpenters 46 County Conference Board* v. *Construction Industry Stabilization Committee*, 522 F.2d 637, 639 n.5 (T.E.C.A. 1975). In the second place, Section 702 does not waive sovereign immunity for claims of "money damages," and it is well established that "[p]rejudgment interest * * * is considered as damages." *Library of Congress* v. *Shaw*, slip op. 11 (citations omitted); see also *id.* at 4-5.

In any event, the clear and unambiguous waiver of sovereign immunity necessary to justify an award of prejudgment interest is entirely lacking. Petitioners point to nothing in the amendment to Section 702 or its legislative history to indicate that it was intended to affect the no-interest rule, and they do not assert that any court has ever so held. The need for some evidence of intent is heightened since petitioners' construction would apply to any action governed by Section 702—indeed, according to petitioners, it would apply to any action against the federal government (see Pet. 21). Similarly, if one accepts petitioners' contention that the award of interest here is permissible because the district court made it in the exercise of its "equitable powers" (Pet. 19-21), this

would enable any court to make such an award in any case, thus completely negating the strong presumption against allowing prejudgment interest. The contention that courts should be allowed to award interest against the sovereign where they deem it equitable was rejected by this Court in *N.Y. Rayon*, which stated that "[c]ourts lack the power to award interest against the United States on the basis of what they think is or is not sound policy" or on the basis of what they think to be "just or equitable" (329 U.S. at 660, 663).[8] There is simply no reason to suppose that Congress intended an exception to that rule.

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[8] In this context, petitioners call upon the Court to rectify the results of "agency misconduct," evidenced by the amount of time DOE took to pay petitioners their exception relief (Pet. 21). While both TECA and the district court expressed dismay at the delay in payment, we note that the latter denied petitioners' motion under the Equal Access to Justice Act, 28 U.S.C. 2412(b), for attorney fees in this matter, because it found no "bad faith" in the agency's actions. Order, Civ. No. J81-0170(B) (May 20, 1986). We also note that the Comptroller General, in an opinion on this and related matters, concluded that DOE's payment before the conclusion of all related litigation was "premature." Op. of the Comptroller General, B-21076.2, .3, .4 (Feb. 7, 1986), slip op. 6-8. While we do not agree with this opinion, it certainly would seem to indicate that this is an issue on which serious, good faith disagreement is possible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1987

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